



UNITED STATES DEPARTMENT OF COMMERCE  
Patent and Trademark Office  
ASSISTANT SECRETARY AND COMMISSIONER OF PATENTS  
AND TRADEMARKS  
Washington, D.C. 20231

**BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES**

Paper No. 18

Application Number: 09/384650

Filing Date: 8/27/99

Appellant(s): Michael et al.

**MAILED**

FEB 26 2003

**GROUP 3600**

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Ralph S. Jocke  
For Appellant

**EXAMINER'S ANSWER**

This is in response to appellant's brief on appeal filed 7/05/01.

Art Unit: 3653

(1) *Real Party in Interest*

A statement identifying the real party in interest is contained in the brief.

(2) *Related Appeals and Interferences*

A statement identifying the related appeals and interferences which will directly affect or be directly affected by or have a bearing on the decision in the pending appeal is contained in the brief. The appellant's brief states there are no related appeals or interferences.

(3) *Status of Claims*

The statement of the status of the claims contained in the brief is substantially correct but for the withdrawal of the obvious rejections of Kraft in view of Pitel during review.

(4) *Status of Amendments After Final*

The appellant's statement of the status of amendments after final rejection contained in the first paragraph of section (4) of the brief is correct.

(5) *Summary of Invention*

The summary of invention contained in the brief is correct.

(6) *Issues*

The appellant's statement of the issues in the brief are broadly correct as summarizing the claims' status. However, the statement of issues fails to detail the factual and legal issues determinative on the status of the claims. As applicant did

Art Unit: 3653

not elect to frame any issues for review, the Office identifies the determinative issues as including principle issues of:

Whether applicant's conjoining elements using an "or" without adequate indentation or punctuation creates indefinite scope claims.

Whether it would have been obvious to dispense medication from a vending machine.

Whether the respective references feature removing or manually adding medical items from a holder.

Whether the respective references dispense or are capable of dispensing cylindrical containers or the dispensing of support cards.

Whether the cited references are capable of reading indicia on a surface.

Whether the Halvorson reference is capable of determining quantities of inventory.

Whether references have modules movable outside doors.

Whether the references recite opening a door.

Whether the art features the use of dual helixes abutting the dispensate.

Whether PTO proceedings are subject to the Administrative Procedures Act and whether the Act triggers the Federal Rules of Appellate Procedure absent an agency rule on point.

(7) *Grouping of Claims*

Art Unit: 3653

Appellant's brief includes a statement that no claims may be grouped together.

However, several dependent claims identically further limit their respective base claims and comprise common groupings. The Office identifies the following Groupings and representative claims:

Group I claims 45, 56 represented by 45.

Group II claims 46, 57, 63 represented by 46.

Group III claims 47, 58 represented by 47.

Group IV claims 48, 59 represented by 48.

Group V claims 49, 60, 62 represented by 49.

(8) *Claims Appealed*

The copy of the appealed claims contained in the Appendix to the brief is correct.

(9) *Prior Art of Record*

The following is a listing of the prior art of record relied upon in the rejection of claims under appeal.

4,023,704	Pitel et al.	5-1977
4,847,764	Halvorson	7-1989
5,377,864	Blechl et al.	3-1995

Art Unit: 3653

5,445,294	Gardner et	8-1995
5,460,294	Williams	10-1995
5,502,944	Kraft et al.	4-1996
5,745,366	Higham et al.	4-1998

## CHALLENGE ART

Cutting Costs Through Consolidation, Security Management	Pearson	12-1996
NARD will keep pressing for an OTC legend class, Oradell	Gannon	2-1993
OTC drugs: Legal but could be Lethal, Current Health	Monroe	12-1994
Charity, Atlantic Monthly, pp91-97	Williams	7-1993
3,709,404	Dana	1-1973

*(10) Grounds of Rejection****Claim Rejections - 35 USC § 112***

Claims 40-60 and claims 63-67 are rejected under 35 U. S. C. 112 second paragraph, as being indefinite for failing to particularly point out and distinctly

Art Unit: 3653

claim the subject matter which applicant regards as the invention. The applicant has conjoined elements using 'or' creating vague and indefinite claims (claim 40L 6; claim 42 L 1; cl 52 L 13; cl 53 L 18). It is unclear whether the conjunction recites alternative embodiments, a device capable of either or one selectively reconfigurable to either. Ambiguity exists on whether the manual applies only to the adding or removing. (re:cl 67) The applicant has used the limitation: generally cylindrical liquid further creating vague and indefinite language as there is no clear delineation of when something becomes generally cylindrical liquid container.

#### *Art Rejections*

The following table of citations identifies relevant claim elements in the principle prior art pertaining to the subsequently listed ground(s) of rejection to the appealed claims:

Art Unit: 3653

Cl ai m	ELEMENT	Blechl	Higham et al. '366	Williams '294	Halverson	Pitel et al.	Kraft et al.
40 52 53	moving the dispenser module from a position within the enclosure to a position outside the enclosure	col. 3 L52 – col. 4 L 2	col. 18 L 43-44	col 9 L 9-57	Fig. 2; col. 3 L 40-43	col. 7 L 27-41 L15-20	col. 5 L 15 –20
40 52 53	adding or removing at least one medical item from the holder while outside the enclosure	col. 2 L 22-24; col 3 L 52- col 4 L 2	col. 18 L 45-47	col 9 L 9-57	col. 3 L 40-43	col.7 L 27-41, less the item being medi- cal	col. 13 L 45 – 56
40 52 53	moving the dispenser from outside the enclosure to within the enclosure such that the holder is within the enclosure	col.3 L 52 - col.4 L 2	col. 22 L 10-15	col 9 L 9-57	col. 3 L 40-43	col.7 L 27- 41	col. 8 L 8- 38
41 52 53	opening the door prior to moving the holder outside the enclosure		col. 18 L 45-47		inherent		
41 52 53	closing the door after moving the holder inside the enclosure				Sequence is inherent Fig. 2		
42 52 54	manually adding or removing at least one medical item from the holder	col.3 L 52 - col. 4 L 2	col. 18 L 43-45		col. 3 L 40-43;	col. 7 L 27- 41, less item is medi- cal	col.4 L 35- 50

Art Unit: 3653

42 43 53	moving the dispenser out of the enclosure so as to make it manually accessible and moving the dispenser module within the enclosure and adjacent to the path;	col. 3 L 52 - col 4 L 2	col. 18 L 43-44;			col. 7 L 27-41;	col. 13 L 38-57
44 55	engaging a helix within the holder a rotating mechanism; engaging a holder guide wherein the first portion of the holder guide is extended in an inside are within the helix and a second portion outside the helix				50 Fig. 2; col. 3 L 40		col. 8 L 25-67;
45 56	placing a dispensate item in contact with a pair of helixes					Abst-ract	col. 5 L 21-37; col. 7 L 26-38; col. 8 L 25-67
46 57 63	reading indicia on a reference surface	col 8 L 45-60	col. 5 L 3-18				col. 9 L 1-28' col. 7 L 53-65



Art Unit: 3653

47 58	moving the cover to the up position prior to moving the cover to the down position		col. 23 L 30-56				col 12 L58- col13 L 3
48 59	extending a limiting member within the inside of the helix, wherein the limiting member prevents medical items from passing through the inside of the helix					128 Fig. 7,2 ; col. 4 L 33-48	col. 8 L 25- 67
49 60 62 67	dispensing a first medical item including a supporting card from the module		col.18 L 1-15; Fig. 3, # 52; col 4 L 53-58		col. 5 L 3- 8	col. 7 L 12-26	col.1 8 L 1-15; Fig. 3, # 52;
49 60 62 67	dispensing a second medical item including a cylindrical liquid holding container from the dispenser module	col. 6 L 61-69	col. 27 L1-20 with Fig. 22, #260;	col. 2 L 14-34.			Fig.2 1, #260 Fig. 21, #260; col. 2 L 45- 50; col. 10 L 25- 40
50	providing the holder with a plurality of items arranged in a stack	col 7 L 46- col.8 L 13					

Art Unit: 3653

50	engaging a follower in engagement with the stack	col 7 L 46 - col 8 L 13					
51	adding a plurality of medical items to the holder in side by side relation to a stack	col 5 L 61-68					
61	providing an enclosure with a delivery area accessible from outside the enclosure providing a first dispenser module within the enclosure, wherein dispenser module includes a plurality of medical items and is selectively operative to dispense first medical items therefrom, providing a second dispenser module in the enclosure in supporting connection with the enclosure through a second support, wherein second and first supports are interchangeably engageable to	col. 7 L46 - col 8 L13			Fig. 2  -----  col. 3 L 50-51  col. 3 L 31-40  col. 3 L 47-63  col. 3 L 40-46  col. 3 L 40-46		

Art Unit: 3653

	support the first or second dispenser modules, and second dispenser includes a plurality of second medical items selectively operative to dispense the second medical items therefrom, wherein second medical items are dispensed from the second dispenser in the enclosure				col. 3 L 35-46  col. 3 L 35-40		
61	dispensing at least one of a first or second medical item to the delivery area	col. 7 L 46-col. 8 L 13			col. 5 L3-8 ; col. 3 L 31-40		
64	determining the number of medical items held in the drawer	col. 8 L 45-60		col. 9 L 15-26	col.5 L 35-65 ; col. 3 L 15-27		col.5 L 38-65
65	engaging the latching lever with the latching pin to hold the module in the first position	col. 7 L 47-58		col 6 L 39-60			
66	dispensing a medical item from one of the modules	col. L 61-69	col.18 L 1-15 with Fig.3 #52	col 7 L 30-50	col. 3 L 31-40		

Art Unit: 3653

*The following ground(s) of rejection are applicable to the appealed claims:*

***Claim Rejections - 35 USC § 102***

1. Claims 65-66 are rejected under 35 U.S.C. 102(b) as being anticipated by Williams '294. Williams '294 as disclosed above.
2. Claims 40, 42, 43, 49, 60, 50, 51, and 61, and 63-66 are rejected under 35 U.S.C. 102(b) as being anticipated by Blechl as demonstrated above.
3. Claims 40, 42, 43, and 46-47, 63 and 66 are rejected under 35 U.S.C. 102(e) as being anticipated by Higham et al. Higham et al '366 as demonstrated above. :
4. Claims 40, 42, 43, and 46-47 are rejected under 35 U.S.C. 102(e) as being anticipated by Kraft et al. as demonstrated above.

***Claim Rejections - 35 USC § 103***

5. Claims 40, 52, 43, 45, 53 and 56 are rejected under 35 U.S.C. 103(a) as being unpatentable over Pitel et al.. Pitel et al. discloses the elements disclosed above.

Pitel et al. disclosed a vending machine with all of the claimed elements but for the dispensate removed and placed within the dispenser and in contact with the dual helixes is a medical item. Examiner took official notice that the dispensing of medicaments in vending machines was well known at the time of the invention. It has long been a practice for hotels, truck stops, train stations, and airports to stock medicaments such as antacids and aspirin in vending machines for travelers.

Art Unit: 3653

In rebuttal to the applicant's challenge of examiner's taking official notice of this point, the examiner supplied and cited as rebuttal evidence references the dispensing of medications in vending machines: Pearson (Robert L.), *Cutting Costs Through Consolidation* (p4 ¶ 9); Gannon (p2 ¶ 2 & 6); Monroe (p 1 boottom); Dana (c 7 L 20-40); Williams, Joy.

Accordingly, It would have been obvious at the time of the invention to stock the vending machine of Pitel et al. with medicaments for the convenience of traveling customers as taught by each of the rebuttal references and thereby come up with the instant invention.

6. Claims 63-67 are rejected under 35 U.S.C. 103(a) as being unpatentable over Williams '294 in view of Higham et al. '366. Williams '294 discloses the elements cited above.

Higham et al. '366 discloses above any elements lacking in Williams '294 of: reading indicia on the reference surface; dispensing a medical item including a support card from one of the modules.

It would have been obvious for Williams '294 to read indicia on a reference surface because reading indicia is a convenient way for a processor controlling a dispenser to recognize and record medication received as inventory as taught by Higham et al '366. It would have been obvious for Williams '294 to dispense a medical item including a support card from one of the modules because

Art Unit: 3653

prepackaged medication often comes attached to support cards for flexibility in storage and display on pegs as taught by Higham et al. '366.

7. Claims 40-43, 46-47, 49, 52-54, 57-58, 60, 62-63, and 66-67, are rejected under 35 U.S.C. 103(a) as being unpatentable over Higham et al. '366. Higham et al. '366 discloses the elements cited above.

It would have been obvious to close the door after moving the holder inside the enclosure because the door was closed before the procedure commenced, the door may only be closed after the holder is inside the closure. Therefore it would have been obvious to close the door after the holder is within the enclosure because closing the door limits access, protects the holder, and facilitates portability of the dispenser as taught by Higham et al. '366. The examiner took official notice that the use of cylindrical holding containers is well known in the medical products art. It would have been obvious to use a cylindrical holding container in the dispensing of medical products because cylindrical holding containers are sturdy and permit easy access to the contents.

8. Claims 40, 42, 43, 44, 46, 48-50, 51, 55, 59-62, as in paper numbers 6 and 8, along with new claims 63-67, are rejected under 35 U.S.C. 103(a) as being unpatentable over Blechl et al. in view of Kraft et al.. Blechl discloses the elements previously discussed. Kraft et al. discloses above any elements lacking in Blechl of: a holder a rotating mechanism; engaging a holder guide wherein the

Art Unit: 3653

first portion of the holder guide is extended in an inside are within the helix and a second portion outside the helix; placing a medical item in engagement with each of a pair of helixes; extending a limiting member within the inside of the helix, wherein the limiting member prevents medical items from passing through the inside of the helix.

It would have been obvious for Blechle to engage such a helix because such action facilitates dispensing of bulk medications as taught by Kraft et al.. It would have been obvious for Blechle to place a medical item in engagement with each of a pair of helixes because placing the medical item in engagement is a necessary precursor to the dispensing of bulk medical items as taught by Kraft et al.. It would have been obvious for Blechle to extend a limiting member within the inside of the helix because such a limiting member prevents extraneous dispensing of medicine as taught by Kraft et al.. It would have been obvious for Blechle to dispense a medical item including a support card from one of the modules because prepackaged medication can be easily stored on pegs with support cards as taught by Kraft et al..

9. Claims 40-43, 46-47, 49, 50-54, 57-67, are rejected under 35 U.S.C. 103(a) as being unpatentable over Higham et al. '366 in view of Blechl et al. Higham et al. '366 the elements previously disclosed.

Art Unit: 3653

It would have been obvious to close the door after moving the holder inside the enclosure because the door was closed before the procedure commenced, the door may only be closed after the holder is inside the closure. Therefore it would have been obvious to close the door after the holder is within the enclosure because closing the door limits access, protects the holder, and facilitates portability of the dispenser as taught by Higham et al. '366.

Blechl et al. discloses above any elements lacking in Higham et al. '366 of: the use of cylindrical holding containers for liquids (col. 8 L 18-36); providing the holder with a plurality of items arranged in a stack (col. 7 L 46-col. 8 L 13); engaging a follower in engagement with the stack (col. 7 L 46-col. 8 L 13); (Re: cl 51) adding a plurality of medical items to the holder in side by side relation to a stack (col. 5 L 61-68).

It would have been obvious to use a cylindrical holding container in the dispensing of medical products because cylindrical holding containers are sturdy and permit easy access to the contents as taught by Blechl et al.. It would have been obvious to a holder with a plurality of items arranged in a stack because such a dispensing arrangement facilitates repetitive dispensing of common sized items as taught by Blechl et al.. It would have been obvious to engage a follower with the stack because such an engagement permits medication to be dispensed in a two phase approach facilitating dispensing in a secure way. It would have been



Art Unit: 3653

obvious to place a plurality of medical items in side by side relation to the stack because such an arrangement facilitates the storing and dispensing of medications of varying sizes as taught by Blechl et al.. It would have been obvious for Higham et al. '366 to engage a latching lever with a latching pin because a latching pin and lever system are easy to control and manipulate via processor controlled solenoids and well protected from outside manipulation by a housing as taught by Blechl et al..

10. Claims 63 and 65-67 are rejected under 35 U.S.C. 103(a) as being unpatentable over Higham et al. '366 in view of Gardner et al. '294. Higham et al. '366 discloses the elements previously disclosed and further discloses: engaging the latch to hold the module in the first position (c28 L 11-41). Higham et al. '366 does not disclose: engaging the latching lever with the latching pin. Gardner et al. '294 discloses: (re: cl 65) engaging the latching lever with the latching pin to hold the module in the first position (c7 L 15-53). It would have been obvious for Higham et al. '366 to engage a latching lever with a latching pin because a latching pin and lever system are easy to control and manipulate via processor controlled solenoids and well protected from outside manipulation by a housing as taught by Gardner et al. '294.

Art Unit: 3653

11. Claim 63-64 and 66 are rejected under 35 U.S.C. 103(a) as being unpatentable over Higham et al. '366 in view of Halverson. Higham et al ' 366 discloses the elements previously disclosed but does not disclose: determining the number of medical items held in the drawer. Halverson discloses: determining the number of medical items held in the drawer (c 5 L 35-65; c 3 L 15-27). It would have been obvious for Higham et al. '366 to determine the number of medical items held in the drawer because determining quantities of inventory in the drawer prevents over-prescribing and may be used to trigger restocking orders as taught by Higham et al. '366.

*Exceeding Brief Size Constraints*

A Petition decision (15) overruling a compliance requirement (paper 13) with FRAP 32(G) 28 U.S.C. Appendix on brief size as triggered by the Administrative Procedures Act was overruled since 37 CFR and 35 USC contain no express brief size limit in ex parte proceedings. The petition did not address, presumably in deference to a Board determination, whether the Administrative Procedures Act 5 USC Section 559 provides a catch-all safety-net triggering the Rules of Appellate Procedure in the absence of an rule on point precluding individuals from gaining extra benefit of process by tilting the playing field and obscuring issues by pursuing a course to overwhelm with volume as a means of compensating and gain allowance on claims not otherwise meriting patentability.

Art Unit: 3653

The Administrative Procedures Act was designed to create uniformity with Federal Agencies, FRAP 28(G) was designed to preclude parties from unsurreptitiously gaining an unfair procedural advantage in appeals. The Board should resolve this matter of first impression before the Board and preclude applicant's scheme to take public domain technology from the public domain through obscuration and overwhelm.

***(11) Response to Argument***

The applicant's numerous arguments have been fully considered but they are unpersuasive in overcoming the rejections. The Office stands on the rejections as supporting themselves and rebuts applicant's principle arguments as best as can be discovered and unburied from the brief and which have been identified as the issues on Appeal above.

In response to applicant's assertion that the rejection is not in compliance with MPEP 707.07(d) because it identifies the text passages without supplementation with drawing numbers, MPEP 706.02(j) (A) states:

“the examiner should set forth in the Office action:

the relevant teachings of the prior art relied upon, preferably with reference to the relevant column or page number(s) and line number(s) where appropriate.”

The MPEP identifies the preferred element identification and supplementing the identification constitutes an unnecessary and superfluous consumption of time.

Art Unit: 3653

Further, as the drawing symbols in a prior art document are directed at understanding or advocating the objectives sought to be advanced by the reference document, elements disclosed in the prior art corresponding with the claim elements in an subsequently filed application are not always identified by drawing symbol in the prior art. This is particularly so with respect to the verb oriented elements of a method claim. The elements the applicant requests are apparatus elements representative of the apparatus claim elements present in apparatus claims such as those applicant elected to prosecute in the parent application of this divisional application.

Due to the applicant selecting differing claim elements for differing claims, those claims rejected under 35 U.S.C. 103 having common elements disclosed in common references used in making an earlier recited rejection of claims under 35 U.S.C. 102, were identified in the body of the 102 rejection rather than repeat the elements in the body of the 103 rejection in the interest of brevity.

*Blechl*

The examiner apologizes for the single letter typographical spelling of the Blechl reference, but it was clear which reference was at issue and the Office does not view such a typographical error as giving a rise to removal of the claimed subject matter from the public domain. The apparatus elements requested by the applicant regarding reference Blechl et al. can be found, among other locations:

Art Unit: 3653

Dispenser (10); holder: (90); Dispenser module (60); Dispenser mechanism (68,70,72,74,82); Medical item (108). A dispensing path exists see (col. 7 L 47-62). Ampules, syringes, liquid cups are cylindrically liquid containers (col.6 L 61-69).

*Higham et al. '366*

The apparatus elements requested by the applicant regarding reference Higham et al. '366 can be found, among other locations: Dispenser "dispensing unit 10" (c13 L 43); Holder: "plurality [of] receptacles for holding items" ( col.7 L 52-53); Dispenser module "receptacles 250 are slidably held behind a cover which is removable from the drawer" (col. 26 L 42-43); Dispenser mechanism (Fig. 32-36, the elements enclosed within drawer 294, particularly as described at (col. 28 L 42-63); Medical item "pharmaceutical items"(col. 26 L 17). (Re: cl 40) Applicant failed to present any method elements in the claims absent from the reference. The dispenser mechanism is a preamble only apparatus element unused in the method step. And while applicant repeatedly alleges his dispenser, as specifically recited differs from the claim, applicant has so broadly recited the element that many dispenser mechanism read on the claim scope even if used or included with any element of the body. (Re: cl 42) asserts Higham does not disclose adding or remove at least one medical item from the dispenser applicant admits in his argument regarding claim 43 that in Higham an item is removed manually.(re: cl

Art Unit: 3653

46, 63) Higham discloses reading number of items reference surface. (col 8 L 45-60).

*Higham et al. '366 and Halvorson*

The examiner apologizes for the single letter typographical spelling of the Halvorson reference, but it was clear which reference was at issue and the Office does not view such a typographical error as giving a rise to removal of the claimed subject matter from the public domain. Halvorson discloses: determining the number of medical items held in the drawer (col. 5 L 35-65; col. 3 L 15-27). The system discusses “maintain an inventory of current quantities...restocking if necessary....will insure that all subsequent day medications are stock at dispensing locations” (col. 5 L 35-65). “inventory data...information inquiry and modification...inventory control reports” (col 3 L 15-27).

*Pitel*

The examiner maintains the rejection because the dispensing of medications including aspirin and antacids in vending machines are well known. In rebuttal to the applicant's challenge that the dispensing of medications are not well known, the examiner offers in rebuttal: Pearson (Robert L.), *Cutting Costs Through Consolidation* (p4 ¶ 9); Gannon (p2 ¶ 2 & 6); Monroe (p 1 bottom); Dana (c 7 L 20-40); Williams, Joy.

Art Unit: 3653

It has long been a practice for hotels, truck stops, train stations, and airports to stock OTC medicaments such as antacids and aspirin in vending machines for travelers. Packages exist which would work in devices such as Pitel. Applicant has not claimed any structure which limits dispensing to one or two tablets. Pitel is not limited to bagged snacks as one can readily see with any helical vending machine. A path and delivery area clearly are seen at the bottom front of the machine (see the push door access limit door).

*Kraft et al.*

Applicant relies upon preamble apparatus element never used by the method steps to attempt to distinguish his method from the Kraft et al. The image reading as cited is a reading of indicia on a surface.

*Williams '294.*

Applicant relies upon preamble apparatus element never used by the method steps in attempting to distinguish his method from Kraft et al.. Latching lever is not used in any method step.

*Gardner '294*

Correction of the omitted Gardner '294 reference from the form '892 on the 12/4/00 final rejection of paper number 10 was effected in accordance with the procedures of MPEP § 707.05(g) which proscribes corrective procedures if a reference is incorrectly cited: If an applicant calls the omission or error the

Art Unit: 3653

attention of the Office within 1 month of the mailing, MPEP § 710.06 proscribes a reset on the response period accompanying the correction. Applicant did not notify the Office within one month so there is no reset on the response period. Applicant knew at the time of the filing of the Brief of the absence and could have contacted the Office if he had truly wanted the reference. Instead, since the chronologically junior Gardner '306 child with priority claim explicitly citing patent 5,445,294 to Gardner was in applicant's possession, it appears applicant recognized the substantive weakness of claim 65 and elected to pursue a non-substantive approach to claim allowance. By not notifying the Office of the omitted reference before filing the brief, the issue is waived.

### **Summary**

The cited references individually and collectively recite the method steps as claimed. Applicant attempts to remove the methods from the public domain by a combination of unutilized apparatus limitations within the preamble, denial of well known applications of equipment, spurious arguments clearly contrary to the evidence, and attempts to distinguish elements from the art and an unduly narrowed interim interpretation of limitations through obscuration of issues with an oversized 123 page brief.

For the above reasons, it is believed that the rejections should be sustained.

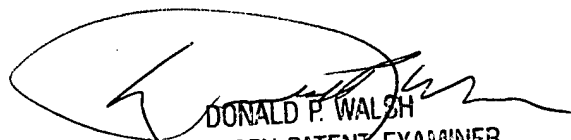


Art Unit: 3653

Examiner Certifies Preceding Word Count: 4613 words.

Respectfully submitted,

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Art Unit 3653